

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LAURA HAWKINS**

Claimant

VS.

**ARMOUR ECKRICH MEATS**

Respondent

AND

**ACE AMERICAN INSURANCE CO. and  
INDEMNITY INS. CO. OF NORTH  
AMERICA**

Insurance Carrier

Docket No. 1,040,531

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier, Ace American Insurance Company, (respondent) requested review of the June 10, 2009, Preliminary Hearing Order entered by Administrative Law Judge Rebecca Sanders. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant is entitled to medical care and ordered respondent to provide claimant with the names of three qualified physicians from which claimant may designate an authorized treating physician to provide her with psychotherapy to address claimant's depression and to provide behavioral pain management.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 1, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file, including the independent medical examination (IME) report of Dr. James Eyman.<sup>1</sup>

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<sup>1</sup> A discovery deposition of the claimant, Laura Hawkins, taken November 11, 2008, was not considered in this appeal because there is no agreement in the record that it could be used.

### ISSUES

Respondent asserts that at the time of the ALJ's June 10, 2009, Order, claimant had not proved that she had a work-related physical injury. Respondent argues that the court-ordered IME report of Dr. Brian Divelbiss, who had been asked to provide an opinion concerning claimant's medical diagnosis and recommendations for treatment, had not been received by the parties. Nor had it been reviewed by Dr. James Eyman, who provided an opinion concerning diagnosis and recommendations for treatment of claimant's psychological condition. In the event the Board finds that claimant had a physical injury and that claimant has a traumatic neurosis, respondent contends there is no traceable link between that physical injury and her psychological problems. Further, respondent argues that it was denied due process when the ALJ issued her order for psychological treatment without permitting the parties to argue the merits of Dr. Eyman's IME and report.

Claimant requests that the Board affirm the ALJ's Preliminary Hearing Order granting claimant's request for treatment for her psychological problems directly traceable to her work-related bilateral extremity injuries. Claimant contends that she has proven that she has suffered physical injuries, including a clinched fist condition of her left hand, while employed by respondent and that those physical injuries have caused her to suffer psychological problems and a pain disorder that are in need of psychological treatment. Further, claimant submits that the ALJ did not deny respondent the right to due process of law.

The issues for the Board's review are:

- (1) Is claimant's need for treatment of her psychological problems a result of a work-related physical injury or injuries?
- (2) Was respondent denied due process of law when the ALJ issued her order for psychological treatment without permitting the parties to argue the merits of the psychological independent medical examination?

### FINDINGS OF FACT

Claimant testified that her job at respondent required her to repetitively use her hands. On or about April 11, 2008, she reported to her supervisor that she was having problems with her hands. She was initially seen at Occupational Health Services, where Dennis Sewell, PA, found she had symptoms of bilateral carpal tunnel syndrome. He restricted her use of the left hand and provided her with a splint for the left wrist. At some point, she was also given a splint to use on her right hand. Nerve conduction studies were performed, and she was diagnosed with bilateral carpal tunnel syndrome with swelling in the hands by Dr. Gary Harbin on May 28, 2008. Dr. Harbin recommended carpal tunnel release surgery on both her left and right hands.

Claimant was then referred to Dr. Anne Rosenthal by respondent for an IME. Dr. Rosenthal confirmed claimant's diagnosis of bilateral carpal tunnel syndrome, which she related to her hand-intensive job at respondent. Dr. Rosenthal also noted that claimant had significant swelling of her left hand, which she attributed to Secretan's disease, which is fictitious edema that is self inflicted. Dr. Rosenthal believed that claimant purposely wore her splint too tightly, causing swelling in her left hand. Both Dr. Rosenthal and claimant's physical therapist noted that claimant had marks on her left wrist from it having been wrapped tightly enough to cause swelling in the hand, and photographs were entered as an exhibit showing the indentations. Dr. Rosenthal recommended claimant have a psychiatric evaluation. However, it was her opinion that the claimant's psychiatric issues were not related to a work-related incident. Further, Dr. Rosenthal stated that she would not consider performing surgery on claimant's bilateral hands because of her Secretan's disease.

Claimant testified that she does not know what caused the swelling in her hands and said she did not purposely tighten her brace in order to cause the swelling. She said that she discontinued use of the brace after being told to do so by Dr. Rosenthal. She said that after she stopped using the brace, the physical therapist wrapped her wrist in gauze and later asked her to wear a glove.

Claimant was evaluated by Dr. Robert Barnett, a licensed psychologist, on October 3, 2008, at the request of claimant's attorney. Dr. Barnett said that claimant had symptoms of depression that were secondary to her work-related injury. He diagnosed her with dysthymic disorder, and he also observed symptoms of anxiety.

Dr. Bruce Toby examined claimant on December 5, 2008, at the request of respondent. Although he diagnosed claimant with carpal tunnel syndrome, he did not believe that carpal tunnel syndrome explained the flexion contractures in her hand. He opined that claimant's hand problem was possibly caused by multiple sclerosis, some type of stroke or other brain abnormality, a psychiatric problem, or malingering.

On December 15, 2008, claimant was evaluated by Dr. Patrick Caffrey, a licensed psychologist, at the request of respondent. Dr. Caffrey also diagnosed claimant with dysthymic disorder. He did not believe that claimant suffered from Secretan's disease. In regard to causation of claimant's psychological conditions, Dr. Caffrey stated:

I believe that [claimant] has a psychological condition consistent with dysthymic disorder with atypical features. These atypical features include increased appetite and a longstanding pattern of interpersonal rejection sensitivity that results in significant social or occupational impairment, possibly in which her mood brightens in response to actual or potential positive events. I believe this psychological condition is related in cause-effect fashion to her work injury. The current evaluation does not support a diagnosis consistent with a somatoform disorder or factitious disorder.

I believe that the work-related injury (Carpal Tunnel Syndrome) is related in cause-effect fashion to her dysthymia and to this extent she would be a good candidate for treatment.<sup>2</sup>

Claimant testified at the preliminary hearing that she was sexually molested as a young girl over the course of a year. She said she told her mother of the abuse, but her mother did not do anything about it and the abuser eventually left the area. She never had any treatment or counseling for the sexual abuse she endured. Claimant married at age 16, but her husband died of leukemia. She was given an antidepressant after the death of her husband, which she discontinued using after two or three months. She is currently married to her third husband, from whom she is estranged. She has a boyfriend and was engaged to him for awhile, but the engagement has been broken. She has three grown children, the youngest of whom has legal problems and is in and out of jail. Claimant also testified that in March 2006, she was sexually assaulted when she was working at a motel. She reported the assault to her employer. She believes that she was treated badly by her employer in regard to that incident, so she walked off that job.

Claimant complains of sleeplessness and anxiety, which she attributes to the pain in her hands. She suffers from excessive tearfulness, poor appetite and irritability. She also has trust issues, which she relates to the treatment she has received from her coworkers and supervisor at respondent. In particular, she described her relationship with a coworker named Angie. She agrees that her problems with Angie first started outside the workplace. However, she said that after she developed problems with her hands, Angie has attacked her, resulting in her being yelled at by her supervisor. She believes that her supervisor has sided with Angie in this vendetta. She testified that her supervisor has accused her of doing things to Angie, such as flipping her off. Claimant also complains that some of her other coworkers teased and mocked her. She was terminated by respondent in February 2009 because she was unable to do 100 percent of her job.

After the preliminary hearing, the ALJ ordered claimant to be seen by Dr. James Eyman, a licensed psychologist, to be evaluated as to any psychological conditions she has incurred as a result of her work related accident and for Dr. Eyman to offer an opinion as to diagnosis, recommendations for treatment, claimant's ability to work, and possible temporary work restrictions. Dr. Eyman met with claimant on May 5, 15 and 18, 2009. Claimant was administered psychological tests. During interviews with Dr. Eyman, claimant stated that because of her injury, she has slowed her production at work. As a result, she is yelled at by her supervisors, the line operator and other coworkers. She also told Dr. Eyman that her coworkers make claw hands and pretend that their hands hurt in order to ridicule her.

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<sup>2</sup> P.H. Trans., Cl. Ex. 2 at 14.

Based on the results of the tests and his interviews with claimant, Dr. Eyman said claimant was depressed and anxious, and opined that “her depression and anxiety are the direct result of her work related injury.”<sup>3</sup> Although claimant had been diagnosed with dysthymic disorder by both Drs. Barnett and Caffrey, Dr. Eyman found that she did not meet the diagnostic criteria for that disorder but, instead, met the diagnostic criteria for major depression, single episode, moderately severe; a generalized anxiety disorder; and a pain disorder.

### **PRINCIPLES OF LAW AND ANALYSIS**

#### **(1) Is claimant’s need for treatment of her psychological problems a result of a work-related physical injury or injuries?**

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>4</sup> Whether an accident arises out of and in the course of the worker’s employment depends upon the facts peculiar to the particular case.<sup>5</sup>

The two phrases arising “out of” and “in the course of” employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises “out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer’s service.<sup>6</sup>

The Kansas Supreme Court has long held that traumatic neurosis, as well as other psychiatric problems are compensable. “[W]e have held that traumatic neurosis *following*

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<sup>3</sup> Independent Medical Examination report of Dr. James R. Eyman, filed June 9, 2009, at 4.

<sup>4</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>5</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>6</sup> *Id.* at 278.

*physical injury*, and shown to be directly traceable to such injury, is compensable under the act.”<sup>7</sup> However, the court in *Berger*<sup>8</sup> cautioned:

Even though this court has long held that traumatic neurosis is compensable; we are fully aware that great care should be exercised in granting an award for such injury owing to the nebulous characteristics of a neurosis. An employee who predicates a claim for temporary or permanent disability upon neurosis induced by trauma, either scheduled or otherwise, bears the burden of proving by a preponderance of the evidence that the neurosis exists and that it was caused by an accident arising out of and during the course of his employment.

In *Love*,<sup>9</sup> the Kansas Court of Appeals stated:

In order to establish a compensable claim for traumatic neurosis under the Kansas Workers' Compensation Act, K.S.A. 44-501 *et seq.*, the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury.

Claimant has established a work-related physical injury, namely bilateral carpal tunnel syndrome. She has met her burden of proving personal injury by a series of accidents that arose out of and in the course of her employment through her testimony and the expert medical opinions of Drs. Harbin and Rosenthal. The ALJ was not required to wait for an opinion from Dr. Divelbiss before making her decision. This was an examination requested by the ALJ and not by a party. The parties were given the opportunity to present their evidence at the preliminary hearing. Neither party requested that the record be held open for additional evidence. After the IME report of Dr. Divelbiss is received, either party is free to request the ALJ's reconsideration of the issue or apply for another preliminary hearing.

Claimant has likewise established that she has symptoms of a traumatic neurosis or another psychological injury or condition through her testimony and the opinions of Drs. Barnett, Caffrey and Eyman. The final question, then, is whether the psychological condition is traceable to the physical injury.

It was the evaluation by Dr. Rosenthal that initially interrupted claimant's treatment for her carpal tunnel syndrome conditions because she suspected a psychological

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<sup>7</sup> *Jacobs v. Goodyear Tire & Rubber Co.*, 196 Kan. 613, 616, 412 P.2d 986 (1966).

<sup>8</sup> *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 550, 506 P.2d 1175 (1973).

<sup>9</sup> *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

component to claimant's condition and recommended a psychiatric evaluation. Dr. Rosenthal is not a psychiatrist or psychologist, and her opinion that claimant's suspected psychiatric issues were not work related is afforded little weight.

Dr. Barnett, who is a psychologist, diagnosed claimant with depression secondary to her work-related injury. He also diagnosed her with dysthymic disorder and observed symptoms of anxiety. He recommended psychological treatment.

Dr. Caffrey, a psychologist, likewise diagnosed claimant with dysthymic disorder. He also related this condition to claimant's work injury, specifically carpal tunnel syndrome, and recommended treatment.

Finally, Dr. Eyman, who is likewise a psychologist, also diagnosed claimant with depression and a generalized anxiety disorder and a pain disorder. He described all three conditions as being a direct result of her work related injury. He disagreed, however, with the diagnosis of dysthymic disorder because claimant had not been depressed for at least two years, which is the diagnostic criteria for this condition. He recommended treatment, including medication and psychotherapy.

Claimant and Drs. Barnett, Caffrey and Eyman all consider claimant to have a psychological disorder that resulted from her work-related physical injuries. All three doctors opined that claimant requires treatment. The ALJ did not err in finding claimant's need for treatment of her psychological problems to be a direct result of her work-related physical injuries.

**(2) Was respondent denied due process of law when the ALJ issued her order for psychological treatment without permitting the parties to argue the merits of the psychological IME report of Dr. Eyman?**

K.S.A. 44-516 states:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

K.A.R. 51-9-6 states in part: "If a neutral physician is appointed, the written report of that neutral physician shall be made a part of the record of hearing. Either party may cross-examine each neutral physician so employed."

In *Collins*,<sup>10</sup> the Kansas Supreme Court stated: “The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case.”

The constitutional requirements of due process are applicable to proceedings held before an administrative body acting in a quasi-judicial capacity.<sup>11</sup> The Kansas Supreme Court has recognized in numerous cases that the right to cross-examine witnesses testifying at administrative hearings of a quasi-judicial character is an important requirement of due process.<sup>12</sup>

In *Adams*<sup>13</sup>, the Kansas Supreme Court stated:

In 73 C.J.S., Public Administrative Bodies and Procedure, § 132, pp. 456-458, we find the essential elements of an administrative hearing summed up in this way:

'An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. . . .'

The requirements of an administrative hearing of a judicial or quasi-judicial character are phrased in this language in 2 Am. Jur. 2d, Administrative Law, § 412, p. 222:

'. . . A hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open, and impartial, and if such a hearing has been denied, the administrative action is void. . . .'

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<sup>10</sup> *Collins v. Kansas Milling Co.*, 207 Kan. 617, Syl. ¶ 2, 485 P.2d 1343 (1971).

<sup>11</sup> *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 784, 473 P.2d 72 (1970).

<sup>12</sup> *Wulfkuhle v. Kansas Dept. of Revenue*, 234 Kan. 241, 246, 671 P.2d 547 (1983).

<sup>13</sup> *Adams v. Marshall*, 212 Kan. 595, 601-02, 512 P.2d 365 (1973).



At the April 1, 2009, preliminary hearing, both parties presented their evidence and rested. Neither party suggested that the ALJ should obtain another expert opinion or requested that the record be held open for additional evidence. Both claimant and respondent were given notice and an opportunity to be heard. At the conclusion of the hearing the ALJ announced that she was taking the matter under advisement. Thereafter, however, instead of issuing her decision based upon the record presented by the parties, she exercised her right to obtain an IME. The ALJ wrote a letter to Dr. Eyman dated April 2, 2009, requesting he perform an examination and give his opinions on diagnosis and recommendations for treatment. Copies of this letter were sent to counsel and counsel were directed to provide Dr. Eyman with the relevant medical records and to schedule the examination. This was apparently accomplished by the parties. Neither party corresponded with the ALJ requesting an opportunity to be heard following the receipt of Dr. Eyman's report.

Dr. Eyman's Independent Psychological Evaluation report is not dated, but it is filed stamped "received" by the Kansas Division of Workers Compensation on June 9, 2009. The report is not addressed to anyone and it does not show copies being sent to counsel. The ALJ issued her Preliminary Hearing Order on June 10, 2009. She obviously considered Dr. Eyman's report because she refers to it in her order.

Respondent argues that it was denied due process because the ALJ issued her decision

without giving the Respondent an opportunity to present an argument opposing Dr. Eyman's report. While Respondent acknowledges that a formal hearing may not have been required, it does assert that both parties should have been allowed the opportunity to present written argument to address the merits of Dr. Eyman's report. By allowing such argument, the Respondent would have been able to assert the defenses noted in this brief.<sup>14</sup>

Respondent does not argue that it desires to take the deposition of Dr. Eyman or otherwise present additional evidence other than to consider the IME report of Dr. Divelbiss, which had not been received at the time of the ALJ's order. This Board Member does not consider respondent to have been denied due process by the ALJ's decision to issue her order before receiving an IME report from Dr. Divelbiss. That report was sought by the ALJ and not by either party. In addition, the ALJ sought that report for a separate issue. As for respondent's request to present argument and be heard on Dr. Eyman's report, better practice would have been for the ALJ to have made certain that the parties had received the report and given them an appropriate length of time to respond before issuing her decision. Nevertheless, respondent's request to present argument has been satisfied by virtue of respondent's appeal of the ALJ's order and this de novo review.

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<sup>14</sup> Respondent's Brief at 8-9 (filed July 31, 2009).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>15</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>16</sup>

### **CONCLUSION**

(1) Claimant's need for psychological treatment is as a direct result of her work-related injuries.

(2) Respondent has not been denied due process of law.

### **ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated June 10, 2009, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2009.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge

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<sup>15</sup> K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>16</sup> K.S.A. 2008 Supp. 44-555c(k).